

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission)	
On Its Own Motion)	
)	03-0596
Implementation of the Federal Communications)	
Commission's Triennial Review Order with)	
respect to Local Loops and Dedicated Transport)	

TDS METROCOM, LLC'S MOTION TO STAY PROCEEDINGS

TDS Metrocom, LLC ("TDS Metrocom") hereby moves that all proceedings in this docket be stayed as a result of the decision of the United States Court of Appeals for the District of Columbia Circuit issued March 2, 2004, in *United States Telecom Ass'n v. FCC*, No. 00-0012 ("*US Telecom*"), pending the final resolution by the federal courts of the lawfulness of the delegations made by the Federal Communications ("FCC"), in its *Triennial Review Order* ("TRO"), to state commissions to make certain determinations including those determinations that are the subject of this docket. In support of this motion, TDS Metrocom states as follows:

1. The Commission initiated this docket by order issued September 30, 2003, in response to directives in the FCC's TRO.¹ The Commission noted that in the TRO:

[W]ith respect to other network elements, namely switching, certain high capacity loops and dedicated transport, the FCC made nationwide findings of impairment or non-impairment, but delegated to state commissions the authority to engage in additional fact finding and make alternative impairment findings based on a more granular impairment analysis in accordance with FCC-established guidelines consisting primarily of actual deployment "triggers" and specific economic and operational criteria. (*Order Initiating Proceeding* (Sept, 30, 2003), p. 1, citing TRO ¶¶ 7, 189, 202, 307, 314, 321-322, 327, 328-338, 424, 461-463, 494 and 498-520 and notes 635, 930, 951 and 1365.)

¹The TRO is *Report and Order on Remand and Further Notice of Proposed Rulemaking*, CC Docket Nos. 01-0338, 96-98 and 98-17, released August 21, 2003.

The *Order Initiating Proceeding* stated that this particular docket would address issues related to (i) the FCC's requirement that state commissions complete proceedings necessary to satisfy the requirements in Section 51.319 of the FCC's rules, as adopted in the TRO, for DS1, DS3 and dark fiber loops and (ii) the FCC's requirements, again in Section 51.319 of the FCC's rules as adopted in the TRO, that the state commissions complete any initial review applying the triggers and criteria for dedicated DS1, DS3 and dark fiber transport, in each case within nine months following the effective date of the TRO. *Id.*, p. 3, citing 47 C.F.R. §§ 51.319(a)(5)-(a)(6) and 47 C.F.R. §§ 51.319(e)(1)-(e)(3). The Commission noted that this FCC directive arose from the FCC's findings that (i) competitive local exchange carriers ("CLEC") "generally are 'impaired' in their ability to compete with ILECs for enterprise customers without unbundled access to ILEC loop facilities," and (ii) "requesting telecommunications carriers are impaired without access to unbundled DS1 transport, DS3 transport and dark fiber transport, subject to a contrary finding by the state commission." *Order Initiating Proceeding*, pp. 6-8, citing TRO ¶¶ 236-38, 249-50, 359 and 47 C.F.R. § 51.319(e). Thus, the *Order Initiating Proceeding* directed:

IT IS THEREFORE ORDERED that an investigation be initiated in order to determine whether requesting carriers are impaired or not impaired without access to (i) DS1, DS3 and dark fiber loops, and (ii) dedicated DS1, DS3 and dark fiber transport, and such investigation will be completed within nine months of the effective date of the *Triennial Review Order*. (*Order Initiating Proceeding*, p. 11)

2. Various parties filed petitions for review of the TRO in various federal courts. These petitions for review ultimately were consolidated in the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit").

3. On March 2, 2004, the D.C. Circuit issued its decision in *US Telecom*. On the issue, raised by various petitioners, of the lawfulness of the FCC's "subdelegations" of authority

to state commissions to make various determinations, the D.C. Circuit held that the FCC had no authority to make delegations such as the one that was the premise for this docket:

We therefore hold that, while federal agency officials may subdelegate their decision-making authority to subordinates absent evidence of contrary congressional intent, they may not subdelegate to outside entities – private or sovereign – absent affirmative evidence of authority to do so. (*US Telecom*, slip op. at 14)

The D.C. Circuit also vacated the specific delegation that gave rise to this docket:

As we explained in the mass market switching context, the Commission may not subdelegate its § 251(d) authority to state commissions . . . We therefore vacate the national impairment findings with respect to DS1, DS3, and dark fiber and remand to the Commission to implement a lawful scheme. (*Id.*, slip op. at 27-28)

In the Conclusion section of its opinion, the D.C. Circuit stated:

To summarize: We vacate the Commission’s subdelegation to state commissions of decision-making authority over impairment determinations, which in the context of this Order applies to the subdelegation schedule established for mass market switching and certain dedicated transport elements (DS1, DS3, and dark fiber). We also vacate and remand the Commission’s nationwide impairment determinations with respect to these elements. (*Id.*, slip op. at 61)

* * * * *

As to the portions of the Order that we vacate, we temporarily stay the vacatur (i.e., delay issue of the mandate) until no later than the later of (1) the denial of any petition for rehearing or rehearing en banc or (2) 60 days from today’s date. (*Id.*, slip op. at 62)

4. The *US Telecom* decision holds unlawful the FCC’s “sub-delegations” to state commissions to make non-impairment determinations, and expressly vacates the FCC’s “sub-delegations” to state commissions to make determinations relating to unbundled transport, thereby declaring unlawful the FCC’s “sub-delegation scheme” on which *this* proceeding is premised. Therefore, based on the substantive decision and holding of *US Telecom*, there is no basis or reason for this Commission to continue with this proceeding.

5. The D.C. Circuit did stay issuance of its mandate with respect to its vacatur of the FCC's subdelegations of decisionmaking authority to state commissions until the later of the denial of petitions for rehearing or rehearing *en banc* or 60 days from the date of the *US Telecom* decision. However, it would be a massive waste of the resources of this Commission and of the parties to this docket to continue with this proceeding until the DC Circuit's mandate is actually issued. First, although issuance of the mandate is stayed, the D.C. Circuit's decision holds the FCC's sub-delegation scheme to be unlawful. Further, based on preliminary review of the *US Telecom* decision, it appears extremely unlikely that any petitions for rehearing to that court would be successful on the fundamental portions of the decision impacting the FCC's sub-delegations, and thus this proceeding. Additionally, any revisions made to the TRO by the FCC in response to the *US Telecom* decision could eliminate the need for this proceeding, or at the very least materially change the determinations to be made by state commissions. Finally, even if the *US Telecom* decision were reversed or modified, and the TRO ultimately emerged in its original form and content, it is highly unlikely that the FCC or the courts would continue to hold state commissions to the July 2, 2004 deadlines originally imposed by the TRO for the various state commission determinations.

6. TDS Metrocom also calls the following to the attention of the parties and the Administrative Law Judge: On March 3, 2004, TDS Metrocom filed a similar motion to stay proceedings in Docket 03-0593, the Commission's docket initiated pursuant to the TRO's directives concerning ILEC batch hot cut processes. At a hearing on March 3 in Docket 03-0593, Administrative Law Judge Moran ruled that there was sufficient merit in the motion to suspend hearings in that Docket, and she did so. ALJ Moran continued Docket 03-0593 generally, and set the following schedule on the motion to stay: March 9 for any responses to the

motion to stay and March 12 for any replies thereto. ALJ Moran expressed the view that it would be appropriate that any similar motions filed in Dockets 03-0595 or 03-0596 be placed on the same schedule so that all such motions in these TRO-related dockets could be presented to the Commission on March 17, 2004.

WHEREFORE, TDS Metrocom, LLC, respectfully requests issuance of an order staying all proceedings in this docket pending the final resolution by the federal courts of the lawfulness of the delegations made by the Federal Communications ("FCC"), in its *Triennial Review Order*, to state commissions to make certain determinations including those determinations that are the subject of this docket.

Dated: March 3, 2004

Respectfully submitted,

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